REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.384 OF 2012

HELLEN MUENI MANTHI…….PLAINTIFF/APPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED…… /APPLICANT

R U L I N G

The application before the court for determination is the Notice of Motion dated 10th September 2012, brought by the Defendant under **Order 2 Rule 15 (1)(b) and Section 3A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, seeking the Plaintiff's suit to be struck out. The application is premised on the ground that there is no justiciable cause of action against the Defendant.

The application is supported by the affidavit of **Paul Gichuhi** dated 10th September 2012. She avers that on the 4th March 2003, the Plaintiff unsuccessfully filed a suit **HCCC No. 15 of 2003 Embu** but on appeal judgment was entered against the Defendant for sum of 8,280,000 by the Court of Appeal in Nyeri. That thereafter, the Defendant allegedly engaged the Plaintiff in negotiations in respect of modalities of payment of its judgment pursuant to Section 41 of the Insurance Act. That the parties allegedly agreed that the payment would be made in installments according to the letter dated 30th June 2010 produced as Exhibit PG 2. The Defendant claim that having paid its share of the judgment and the Plaintiff having discharged it, then there cannot be a justiciable cause of action against the Defendant. The Defendant stated that the Plaintiff's cause of action can only be against the Defendants in the **High Court Civil Suit No. 15 of 2003 Embu.**

The application is opposed. The Plaintiff filed a replying affidavit dated 16th November 2015. The Plaintiff avers that she was involved in an accident in a car insured by the Defendant. She instituted proceedings against the registered owner Moriss Syano Syuki in **HCCC 15 of 2003 at Embu** and the matter was heard and determined by Lenaola J. The Plaintiff/Applicant being dissatisfied with the decision in the High court appealed to the court of Appeal in **Civil Appeal No. 352 of 2005.** Judgment was entered in her favour at the court of appeal in the sum of Kshs.8,280,000/- together with cost. The Plaintiff executed the decree against the registered owner of the vehicle but she was not successful since the Defendant was then under statutory management.

The Defendant explained that her advocates held meetings with the representatives of the Plaintiff who insisted on settling the claim at Ksh 5,000,000/-. The Defendant later changed the offer to 3,000,000. The Plaintiff rejected the offer and she started the preparation to file a declaratory suit. In June 2010 the Plaintiff went down with malaria and she was admitted at St Mary Hospital Nairobi. Treatment was withheld particularly because of lack of finances and at that point she risked losing her life. Her children contacted the Defendant to pleaded with the Defendant to release even what they had offered (Kshs.3,000,000/-). The Defendant agreed to release the money and the same was accepted by the

Plaintiff on the condition that the court case in Embu would not be marked as settle or satisfied. He advocates assured her that the payment would not amount to final settlement of the suit. The Plaintiff's claim is that she did not authorize her advocates to settle or compromise the suit at Ksh 3,000,000/-.

In her further/supplementary Affidavit dated 17th December 2013, the Plaintiff/Respondent states that the capping of liability to Ksh.3,000,000 is not applicable to this case. That the capping of liability was never negotiated and the amount was never conceded. The Plaintiff/ Respondent denied that she executed the alleged discharge voucher. She stated that she could not have done the same without the involvement, approval and consent of her counsel who could have witnessed the discharge. She maintains that the suit has contestable issues which cannot be resolved at the interlocutory stage.

The application was prosecuted by way of written submissions. The Defendant submitted that section 34 of the Finance Act miscellaneous Amendment bill was introduced before the court of appeal delivered its judgment in the Plaintiffs suit. The Defendant submitted that the amendments had an effect on **Section 5 and 10 of the Insurance (insurance (Motor Vehicle & Third Party Risk) Act** that provides for the duty of an insurer to satisfy judgment against persons insured. The Defendant relied on the case of **James Muriithi Mugo vs Kenyan Alliance Insurance Company Limited (2010) eKLR** where Ouko J held that the suit must fail in lieu of the amendment. The Defendant submitted that the current suit is incapacitated by the said amendment, the Defendant having complied with the statutory obligation imposed by the said Section of Insurance (Insurance (Motor Vehicle & Third Party Risk) Act.

On the allegation that the Plaintiff did not sign the execution of discharge voucher, the Defendant submitted that the burden of proof is on the Plaintiff to show that the said execution was carried out without her consent but that she failed to demonstrate the same. The Defendant further submitted that the Plaintiff failed to establish a prima facie case with regards to the said allegations. The Defendant maintains that the discharge voucher was executed by the Plaintiff on her own volition and the same amounted to unequivocal admission of the final settlement of the Defendant's share of the decretal sum.

The Plaintiff on the other hand submitted that the matter should be set down for hearing. The Plaintiff claimed that from the totality of the pleadings on record there are contestable and triable issues which can only be determined during a full hearing with the aid of viva voce evidence. The Plaintiff further stated that the principles of administration of justice require that the substance of all disputes should be investigated and decided on their merit.

The Plaintiff also submitted that if amendments having been made after the effective date of the judgments, the amendments cannot have a retrospective effect. The Plaintiff relied on the case of **James Muriithi Mugo vs Kenya Alliance Insurance Company Limited** in which the court held that the claim before the court was excluded by the amendments which came into effect later than the award. The Plaintiff further submitted that the effective date of the judgment in the primary suit is 28th October 2005 and the amendment cannot therefore, have a retrospective effect.

The Plaintiff also submitted that the discharge voucher was not signed when the Defendant released the last cheque. The Plaintiff submitted that the law of execution of documents provides that whatever the document may be, it cannot be used in evidence until its genuineness has either been admitted or established by proof which should be given before the document is accepted by the court. The Plaintiff further submitted that section 71 of the evidence Act provides that if a document is required to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. According to the Plaintiff the Defendant seems to have taken the discharge voucher to the Plaintiff without the knowledge of the Plaintiff advocate. The Plaintiff claims to have no capacity to execute a discharge voucher having lost both hands in the accident.

The Plaintiff further submitted that Order 22 rule 1, 2 & 3 set out how all money payable under a decree or order shall be paid. The Plaintiff stated that there is a judgment and decree of the high court which has not been fully settled. The Plaintiff argued that if the intention of the parties was to settle the same and discharge the Defendant/Respondent from any liability then the parties would have recorded a consent marking the matter as settled. The Plaintiff stated that a judgment or decree of the High Court or any

court for that matter, cannot be compromised by a letter or a discharge voucher and the same can only be compromised by a consent order recorded in court and duly endorsed by the registrar.

I have considered the rival arguments by both parties in the supporting, replying affidavit and the written submissions filed in court. The issue for determination by the court is ***whether the suit should be struck out.***

Striking out or dismissing a suit is a summary remedy that must be granted in the clearest case with extreme caution since a court of justice should aim at sustaining a suit rather than terminating it by summarily dismissing it. The substantive law on striking out pleadings is based upon **Order 2 Rule 15 of the Civil Procedure Rules**. Sub-rule 15 (1) of the aforementioned Order, it is provided that:

"(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. ***it discloses no reasonable cause of action or defence in law; or***

b. ***it is scandalous ,frivolous or vexatious;or***

c. ***it may prejudice , embarrass or delay the fair trial of the action; or***

d. ***it is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."***

The law on striking out of pleadings has been well settled by the Court of Appeal in the case of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** in the finding of Madan, Miller & Potter, JJA wherein the court stated:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment."

In the instant case, the Defendant claims that the plaint does not disclose any cause of action against the Defendant since it paid its share of Ksh.3,000,000 according to the provisions of the law.

In **D T Dobie vs. Muchina** (supra) the Court of Appeal expressed itself *inter alia* as follows:

"Reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint…A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved…It is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face…The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of that power…Whereas no evidence is permitted in the case of Order 6 Rule 13(1)(a), it is permitted in the case where there is an allegation that it is an abuse of the Court process…A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal…If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not

act in darkness without the full facts before it."

In considering whether or not a plaint or a pleading raises a cause of action, the court must look at the pleadings only and not go beyond the pleadings. The Defendant stated in its defense that it met its obligation as per Section 34 of the Finance Act Miscellaneous Amendment Bill. According to the Defendant the amendment also affected Section 5 and 10 of the Insurance (Insurance (Motor Vehicle & Third Party Risk) Act. Section 5 provides:

"5. Requirements in respect of Insurance Policies: -

In order to comply with the requirements of Section 4, the policy of Insurance must be a policy which: -

a. ***is issued by a company which is required under the Insurance Act, 1984 (Cap 487) to carry on motor vehicle insurance business; and***
b. ***insurers such person, persons or classes of persons as may be specified in the police in respect of any liability which may be incurred by him or them in respect of the death, of or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.***

Provided that a policy in terms of this Section shall not be required to cover:

i. ***liability in respect of the death arising out of and in the course of his employment of a person in employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or***
ii. ***except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or***
iii. ***any contractual liability;***
iv. ***liability of any sum in excess of three million shillings, arising out of a claim by one person [Act No. 46 of 1960, Section 48 Act No. 10 of 2006, S. 34.]***

Section 10 also provides that:

Duty of the insurer to satisfy judgments against persons insured.

1. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of an enactment relating to interest on judgments."

From the above provisions of the law it is clear that the Defendant has an obligation to pay the money payable under the judgment. In this case the court awarded the Plaintiff Kshs.8,280,000/- in Appeal number 352 of 2005. It is the Defendant case that it paid the Plaintiff the required amount according to the above provisions of the law which is Ksh.3,000,000/-. The Defendant also claims that the Plaintiff accepted the payment and executed the voucher which marked the matter as settled. The claim is disputed by the Plaintiff. It is the Plaintiff position that the Defendant only paid part of the money and they are yet to pay the balance thus the current proceedings. The Plaintiff has also denied executing the said payment voucher stating that she had no capacity to execute the document.

From the fore going, I find the pleadings are raising triable issues which can only be determined during trial through the trial court's investigation. There is, therefore, a cause of action for this court to determine. When a court is faced with an application to strike out a suit like in this case the one thing that

remains clear, and that is that the power to strike out a pleading is a discretionary. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter. See **D T Dobie Vs. Muchina** (supra) Justice will therefore, be served in this case by allowing the suit to go to its full hearing and a final determination of the issues raised, made. According, I find the application dated 10th September to have little merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of May, 2015.

…….

D A ONYANCHA

JUDGE